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CHARLES ELMORE ORDER
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NO. 4371

In The
Supreme Court
of the United States

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OCTOBER TERM, 1945

CORNUCOPIA GOLD MINES, a private Corporation,
Petitioner and Appellant,

vs.

CARL LOCKEN, Administrator of the Estate of Anna
Locken, Deceased,
Respondent and Appellee.

**Petition for Writ of Certiorari and
Brief in Support Thereof**

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SUBJECT INDEX

	PAGE
Petition for Writ of Certiorari.....	1
Summary Statement of Matter Involved.....	2
Jurisdictional Statement.....	9
Questions Presented	11
Reasons Relied on for Allowance for Writ:	
A	12
B	12
C	14
Prayer for Writ.....	16
Brief in Support of Petition for Writ of Certiorari.....	17
Jurisdiction	17
Preliminary Statement	17
Specification of Errors:	
Summary Point I—Argument	19, 20
Summary Point II—Argument	22, 23
Summary Point III—Argument	27
Summary Point IV—Argument	32
Analysis of Circuit Court's Opinion.....	32

INDEX TO CASES

	PAGE
Beaumont Sour Lake & Western Railway Co., et al v. U. S. of America, et al, 282 U. S. 74, 75 L. Ed. 22	29
Bowles v. Russell Packing Co., 140 F (2d) 354 (CCA 7)	10, 13, 30
Briggs v. John Yeon Co., 168 Or. 233	26
Brown v. Quinlan, Inc. 138 F. (2d) 288 (CCA 7)	10, 13, 31
Erie Railway Co. v. Tompkins (304 U. S. 64, 82 L. Ed. 1188)	8, 10, 11, 12, 22
Hazeltine Corp. v. General Motors Corp., 131 F. (2d) 34	31
Judicial Code, Sec. 240 (a), 28 U. S. C. A. 347	18
Keeran v. Spurgeon Mercantile Co., 194 Iowa 1240 (191 N. W. 99, 27 A.L.R. 579)	24
Kesterson et al, v. California-Oregon Power Co., 114 Or. 22 (228 Pac. 1092)	25
Lange v. St. Johns Lumber Co., 115 Or. 337 (237 Pac. 696)	8, 20, 24, 25
Lee v. Hoff, 164 Or. 374 (97 Pac. (2d) 715)	37
Mayo v. Lakeland Highlands Canning Co., 309 U. S. 310, 84 L. Ed. 774	28
Napier v. First Congregational Church, 157 Or. 110, 115, 70 Pac. (2d) 43	26
Ordinary of State of New Jersey v. U. S. Fidelity & Guaranty Co., 136 F. (2d) 537 (CCA 3)	10, 13, 30
Paramount Pictures Distributing Co. v. U. S. of America, 304 U. S. 55, 82 L. Ed. 1146	28
Rauch v. Stecklein, 142 Or. 286 (20 Pac. (2d) 387)	37
The Sudbury, 14 Fed. (2d) 533	27
38 Am. Jur. Negligence, 759	26
U. S. of America Interstate Commerce Commission et al v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., et al, U. S. 499, 79 L. Ed. 1023	29
Vanderbeck v. Hendry, 34 N.J.L. 467	25
Ward v. Southern Pacific Co., 25 Or. 433 (36 Pac. 166, 23 L.R.A. 715, 60 Am. & Eng. R. Cas. 34, 12 Am. Neg. Case 516)	26
Wessell, et al v. Seminole Phosphate Co., 13 F. (2d) 999 (CCA)	10, 13, 30
Wilmot v. McPadden, 78 Conn. 367 (65 Atl. 157, 19 L.R.A. (N.S.) 1101)	26
Federal Rules of Civil Procedure, Rule 52 (a)	28

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**Petition for Writ of Certiorari
and Brief in Support Thereof**

*To: The Honorable Harlan Fisk Stone, Chief Justice,
and Hugo L. Black, Stanley Reed, Felix Frankfurter,
William O. Douglas, Frank Murphy, Robert H. Jack-
son and Wiley Rutledge, the Associate Justices of the
Supreme Court of the United States.*

The petitioner, Cornucopia Gold Mines, respectfully
petitions this Honorable Court for Writ of Certiorari

to the United States Circuit Court of Appeals for the Ninth Circuit.

SUMMARY STATEMENT OF THE MATTER INVOLVED

The District Court in a tort action (without a jury) declined to declare the local law put in issue, and in violation of Rule 52 (a) of the Federal Rules of Civil Procedure refused to make findings on pivotal question as to status of deceased at place where accident occurred and without which there is no basis under the Oregon law for determining liability, i.e., if deceased was there as an invitee, the rule of ordinary care applies; whereas, if deceased was there as licensee (or trespasser), the Oregon rule requires a showing of "wilful or wanton" injury. There was no claim made nor issue raised that Petitioner was guilty of "wilful or wanton" conduct. The Circuit Court of Appeals in affirming declined to declare the local law and assumed facts which the District Court had refused to find; supplied new unsupported fact that Petitioner was guilty of "wanton" negligence and upheld judgment on general law contrary to the local law, and on a new theory not in issue, namely, that Petitioner was charged with an active duty to keep the premises safe for deceased even though she be classed as a trespasser.¹

¹ See Analysis of Circuit Court's Opinion at Page 32 of supporting brief.

The action is for alleged wrongful death commenced by Appellee, as Administrator of the Estate of Anna Locken, Deceased, who was electrocuted through touching an electric wire which broke and fell into brush under Petitioner's 2300 volt private electric line used in its mining operation. The accident occurred some 50 miles North of Baker, Oregon in a remote area on the east side of the Wallowa mountains. The body of deceased was found 251 feet from a private road built by Petitioner for hauling ore from its Union mine. The road, a mile and one-half in length, leads from the ghost mining town of Cornucopia, Oregon, up the mountain side to Petitioner's Union mine, where it terminates. At the time of the accident, Union mine had been shut down for a period of over six months and the ore road was not in use. There was no travel on the road during the winter; no one was living in that section; in that area snow piles up in the winter to a depth of nine to thirty feet; there were no people during that period up in that vicinity. (R 62, 211). In order to travel up the road to the mine during the snow season, it was frequently necessary to go on snow shoes. The actual location of the point where the accident occurred was not in dispute; the dispute was over who owns the land, and her status there. Deceased started up the road with her mother. They were "looking for mushrooms. We were just playing" (R 77). She disappeared from her mother's sight, wander-

ing off the road at some unknown point into the brush. She was found beneath Petitioner's electric line where a wire had broken and fallen into the brush below; her hand had touched the electric wire. Appellant's surveyor testified from actual survey and established legal boundaries that the point of the accident was 85 feet inside Appellant's property line. Mr. Sneddon, mine superintendent, had been up the road a week before the accident and the wire then was in its proper place. The line had been built some six (6) years before the accident; it consisted of a three-phase circuit of No. 4 hard drawn copper wire carrying alternating current. There had been no previous breaks in the wire up to the time of the accident. (R. 122, 201, 231.) There is no evidence that the wire had been down for any period of time prior to the accident.

The status of the deceased at the place of the accident was put in issue. The complaint was framed on the theory that the deceased was lawfully at the place where the accident occurred (R 6) and upon the trial, Respondent undertook to prove that the accident occurred on premises of a third party and claimed the right to recover solely on the basis, that the accident did not occur on Petitioner's premises (R 137, 138, 139). Petitioner took the position that deceased entered and was injured upon its premises occupied by its electric line and was there solely for her own pleasure and without any business with

or invitation from Appellant.

This defense is based on the local law of the State of Oregon, which has been declared by the Supreme Court Oregon, to the effect that a property owner is not liable for injuries sustained upon his land by a licensee or trespasser unless the injury was inflicted "wilfully or wantonly" by the property owner; and that a person who goes upon the premises of another for his own pleasure and without benefit to or invitation from the owners occupies the status thereon at most of licensee or trespasser. In Oregon, the law is that when such a person for his own purpose or pleasure makes use of another's property, even with the owner's knowledge, he is there merely by toleration; it is merely by a permissive use which cannot and does not ripen into an invitation. The pretrial order raised these basic questions:

"Who owned the property at the place where the accident occurred and which party has the burden of proving ownership of said property?"

and the further question of:

"What, if any, legal duty was owed by defendant to decedent, and was there a violation of any such legal duty?"

The Court did not make a ruling during the trial as to who had the burden of proving ownership of the property, or what duty was owed by defendant to decedent. At the conclusion of the trial, ownership of the premises in order to determine the status of deceased was recognized as the controlling issue, the District Court was of such opinion, and so stated, (R 246):

“The Court: All right. There is only one thing I want to make perfectly plain to you now, that whoever carries the burden of establishing where this spot is loses it, from the testimony I have got from you right now; whoever is carrying that burden as to where the spot was, loses out, either side.

“Mr. Powers: That is, as to the ownership of the property, you mean?

“The Court: Yes.”

This point of who had the burden of proving ownership of the property where the accident occurred was thereafter briefed in the lower court, and when it became obvious that the plaintiff had the burden of proving the deceased's right to be at the place where the accident occurred, the Court during hearing on petitioner's objections to proposed findings for failure to determine specific questions raised in pre-trial order changed its view that the party having that burden would lose the case and stated it would get around that point by saying the acci-

dent happened close to the property line, "maybe within a few feet." (R 257):

"The Court: No. You are trying to make me find on one side or the other, and *I do not think the evidence is sufficient to find one way or the other.* The way I got around it was to say that there is no question but what it is extremely close to the line; that either way the line may happen to fall, this spot is very close to the edge of the property, maybe within a few feet, and that is all even the defendant's evidence shows on the subject, but it did seem to me a competent surveyor could have gone in there and settled this question, but that was not done. * * *

Respondent's counsel by objection prevented further survey from being made (R 247). Defendant's evidence shows the accident occurred 85 feet inside its property line and the Court refused to find against Petitioner on the point.

(R 253) "I would answer the question squarely, if I thought I could, but from the evidence I don't think it can be, and I won't make a finding against the defendant."

The court thereafter entered judgment without declaring any legal theory on which Petitioner was being held liable.

Written objection to this unusual course of judicial

procedure was filed in the District Court by Petitioner, and the District Court was expressly requested to comply with Rule 52 (a) of the Rules of Federal Procedure, namely "to find the facts specially and state separately its conclusions of law thereon." (R22)

Upon appeal to the Ninth Circuit Court of Appeals, Petitioner in its Specification of Errors raised these same questions. Petitioner in its brief took the position that it was relying entirely upon the Oregon law. *Erie R. Co. v. Tompkins* (304 U.S. 64, 82 L. Ed. 1188) was cited to the Circuit Court in requesting it to declare the Oregon law. The Circuit Court declined to do so. The Circuit Court of Appeals in affirming the lower court failed to declare the Oregon law; its decision is grounded solely upon a single case from the State of Washington and a general statement from the Restatement of the Law of Torts. In short, the Circuit Court bypassed the Oregon law which holds that the deceased under the uncontradicted facts here, would be either a licensee or a trespasser, and that there is no liability except for "wilful or wanton" injury.

Appellant briefed the point in the court below, citing the leading case in Oregon, namely: *Lange v. St. Johns Lumber Co.*, 115 Or. 337 (237 Pac. 696), and other decisions by the Supreme Court of Oregon which follow, and there are none to the contrary. The Circuit Court

of Appeals declined to give consideration to these authorities.

In its decision, the Circuit Court of Appeals assumes that the accident occurred on Appellant's property, although there was no such finding by the District Court. Under the assumed fact that the accident occurred on Petitioner's premises, the Circuit Court declares that Petitioner owed the deceased the duty of exercising ordinary care. The Circuit Court to bolster its decision concludes that Appellant was guilty of "wanton" negligence (R 275). Such finding is contrary to the view of District Court; moreover, it is outside the issues and is directly contrary to Oregon law (brief P. 37). In short the case was tried in the lower court on one theory: the District Court entered judgment on some undisclosed theory and the Circuit Court affirms by supplying new factual conclusions on a third theory.

JURISDICTION

The date of the judgment to be reviewed is June 29th, 1945.

The statutory provision which is believed to sustain the jurisdiction of this Court is Sec. 240 (Title 28—Sec. 347 U.S.C.A.) of the Judicial Code as amended).

Jurisdiction obtained in the Federal Court by reason

of diversity of citizenship. The jurisdiction of this Court is beyond question. This Court has issued Writ of Certiorari to review a judgment of a Circuit Court of Appeals upon a showing that the Federal Court had decided the case upon general law and declined to declare the local law in issue in probable conflict therewith, *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188.

Further, this Court has jurisdiction to decide whether Rule 52 (a) of Federal Rules of Civil Procedure makes it mandatory upon a District Court trying an action without a jury "to find the facts specially and state separately its conclusions of law thereon" to the end of clearing conflicting interpretations placed thereon by several Circuit Courts of Appeal. The Ninth Circuit Court of Appeals in this case in attempting to supply essential facts upon vital issues which were left unresolved by the lower court is in conflict with *Bowles v. Russell Packing Co.*, 140 F. (2d) 354 (CCA 7), and *Brown v. Quinlan, Inc.*, 138 F. (2d) 288 (CCA 7), *Ordinary of State of New Jersey v. United States Fidelity & Guaranty Co.*, 136 F. (2d) 537 (CCA 3), and *Wessel, et al, v. Seminole Phosphate Co.*, 13 F (2d) 999 (CCA), and this Court has jurisdiction to place a final interpretation as to whether this rule is mandatory and must be complied with.

QUESTIONS PRESENTED

I

Whether it is an unconstitutional usurpation of judicial authority for a Circuit Court of Appeals in affirming judgment of lower court to decline to declare issue of State law and instead place its decision on basis of general law in view of the interpretation given to Section 34 of the Federal Judiciary Act of September 24, 1789 (Sec. 28 U.S.C.A. Sec. 725) by this court in *Erie R. Co. v. Tompkins*, 304 US 64, 82 Law Ed 1188.

II

Whether District Court trying tort action without jury can enter a valid judgment without making basic finding of fact, i.e., status of deceased on premises; whether she was invitee or mere licensee; and without deciding the local law arising out of one or the other of such legal relationships in issue in light of Rule 52 (a) of the Federal Rules of Civil Procedure.

III

Whether under Oregon law there is any evidence to support the judgment, and particularly whether there is any evidence to support the facts and conclusions supplied by the Circuit Court of Appeals to the effect that petitioner was guilty of "wanton" negligence, and

whether there is any evidence to support the verdict on the theory that deceased was an invitee.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

A

Review should be granted because there is presented a matter of major concern to the integrity of the Federal Judicial procedure.¹ This is not merely a decision on an important question of local law in probable conflict with applicable local decisions, but it goes much deeper than that. It is a question of an unlawful invasion by the Federal Court of petitioner's constitutional right to have the State law declared and applied. The Circuit Court in basing its decision on general law and in failing to declare the local State law in issue has failed to apply the authoritative rule established by this Court in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 82 Law Ed. 1188, which is to the effect that the local State law governs and that a Federal Court in entering judgment based on general law when applicable local law is put in issue and asked to be declared invades the "rights * * * reserved by the Constitution to the several States."

B

Review should be granted to the end of placing a

¹ The Business of the Sup. Ct. Harv. L. Rev. 238, 274.

final interpretation upon Rule 52 (a) of the Federal Rules of Civil Procedure, which provides:

"In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusion of law thereon and direct the entry of the appropriate judgment; * * *"

This Court should declare whether that rule is mandatory upon the District Court to find the facts specially and state separately its conclusions of law thereon. There is now a conflict of interpretations placed upon the rule by several Circuit Courts of Appeal. The Ninth Circuit by its decisions in this action in attempting to supply essential facts (wanton negligence) upon vital issues which were left unresolved by the lower court is in conflict with *Bowles v. Russell Packing Co.*, 140 F. (2d) 354 (CCA 7), and *Brown v. Quinlan, Inc.*, 138 F. (2d) 228 (CCA 70), *Ordinary of State of New Jersey v. United States Fidelity & Guaranty Co.*, 136 F. (2d) 537 (CCA 3), and *Wessel, et al, v. Seminole Phosphate Co.*, 13 F. (2d) 999 (CCA), in which it was held,

"The ultimate facts in issue are not covered by the findings, this Court cannot supply them from evidentiary matters found, but must remand the cause for a new trial." Citing cases.

It would seem that a review by this Court is neces-

sary in the interest of orderly appeals. For instance, in this case the appeal to the Circuit Court of Appeals because of a lack of findings of fact and conclusions of law, Petitioner had to brief several different theories which the District Court may or may not have had in mind. If the District Court had made proper findings as requested, it would have been possible to raise questions of the sufficiency of the evidence to support such findings. In the absence of the findings, the petitioner was left in the dark and consequently had to shoot in the dark.

C.

Review should be granted because of the unusual procedure followed by the Court below. Ordinarily it would not be suggested that this Court grant certiorari for insufficiency of evidence to support the judgment; however, it is the first opportunity petitioner has had to raise the question of the insufficiency of evidence to support the conclusions reached by the Circuit Court of Appeals that petitioner was guilty of "wanton" negligence. Such new factual point and legal conclusion drawn therefrom originates in the opinion of the Circuit Court of Appeals, and Petitioner has never had an opportunity to meet the question nor present the Oregon law as to what constitutes "wanton" negligence.

Both courts were derelict of their judicial duties in

failing to declare the Oregon law and in ignoring the essential facts in issue, and the conduct of the Circuit Court in upholding the judgment on the so-called general law from the one case from the State of Washington and a general statement from the Restatement of Torts in the light of this Court's ruling that local state law must be declared and applied would seem to present a situation which should be reviewed and corrected by this Court. All the more so because the Washington case referred to and the general statement from the Restatement of Law deals with a situation which is foreign to and not in point with the factual situation here. Our facts deal with a broken wire that fell without notice or knowledge to the Petitioner. The Washington authority and the quotation from the Restatement of the Law of Torts applies to a situation where the owner or possessor of premises himself creates or maintains a concealed dangerous condition at a place upon his premises which to his knowledge is likely to cause death or serious injury to trespassers. Note that it requires actual "knowledge" of the dangerous condition, which of course a person would have where he himself constructs or actively maintains such dangerous condition; whereas, here the dangerous condition was unknown to petitioner. It did not create or maintain a dangerous condition; it had no knowledge that the wire was down (R210), and Respondent's

expert witness testified there was not enough arc between wire and brush "to fill up their breakers at the plant" (R 101), which would have cut the circuit. Now, if the circuit had been cut through, a ground or short on the line, and Petitioner knowing that a wire was down had thrown the circuit breaker back into place and re-energized the line, that would be something else again, but it is not present here. The situation here falls within the so-called "broken wire cases" on privately owned premises, and the Circuit Court therefore not only failed to declare the Oregon law but misapplied the so-called foreign law.

WHEREFORE, your Petitioner prays that Writ of Certiorari issue to the United States Circuit Court of Appeals for the Ninth Circuit to the end that this matter may be reviewed and be determined by this Court as provided by the statutes of the United States, and that the judgment of said Circuit Court be reversed, and for such further relief as to this Court may seem proper.

Respectfully submitted,

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DEAN A. DICKINSON

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R. A. IMLAY *of Counsel.*